



REPUBLIC OF KENYA



KENYA LAW
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**Waruru & another v Milimu (Civil Appeal E075 of 2022)
[2023] KEHC 4040 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E075 OF 2022**

**MW MUIGAI, J
APRIL 28, 2023**

BETWEEN

JOHN WARURU 1ST APPELLANT

DOUBLE NINE SIX LIMITED 2ND APPELLANT

AND

CAROLINE IMINZA MILIMU RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Martha Opanga SRM in Kangundo Chief Magistrate Court in CMCC No. 107 of 2020 delivered on 31st May, 2022 in relation to Appellant's/defendant's Notice of Motion dated 21st December, 2021)

RULING

Notice of Motion

1. The Appellant filed an application dated 10th June, 2022 and sought the following orders:
 - a. Spent
 - b. Spent
 - c. That this Court order a stay of execution of the decree passed on 31st May, 2022 by Hon. opanga (SRM) in Kangundo CMCC No 107 of 2020 between Caroline Iminza Milimu v John Waruru & Double Nine Six Limited pending the hearing and determination of this appeal.
 - d. That the costs of this application be provided for.
2. The Application is supported by the annexed affidavit of Eric Wanjohi Gitau and based on the following grounds;



- a. The Ruling in Kangundo CMCC No 107 of 2020 between Caroline Iminza Milimu v John Waruru & Double Nine Six Ltd was delivered on 31/05//2022 in favour of the Respondent dismissing the Applicants notice of motion to set aside judgment.
- b. There is no stay of execution and execution is underway as the respondent has had warrant of attachment re-issued consequent of which two of the appellants motor vehicles registration numbers KBB 711G & KBM 003H each valued at Kshs 1,000,000/- have been seized by Anfield Auctioneers in recovery of the decretal sum of Kshs 412,446.50/-.
- c. If the intended sale proceed before the current appeal is heard and determined this appeal will be rendered nugatory and the Appellants will suffer injustice, loss and damage as they will have been denied an opportunity to defend themselves yet their non – participation in the primary suit was not their fault.
- d. The Appellant have a good arguable appeal which raises triable issues.
- e. If the Appellants/Applicants vehicles are sold, it is not likely that the Respondent would be able to reconstitute the sum the two vehicles are valued at or the decretal sum altogether in the event that the appeal succeeds.
- f. The Appellants/Applicants are willing to abide by this Court orders imposed for the granting of the sought stay of execution orders and as security for due performance of the decree.
- g. The Respondent can be compensated by way of costs for any loss she may suffer following the granting of the orders sought herein so as to allow justice to be done to all the parties.

Replying Affidavit Sworn On 23/06/2022

3. The Respondents filed her Replying affidavit deposing as follows;
 - a. On 19th May, 2021 judgment was delivered on 19th May 2021 in Kangundo CMCC No 107 of 2020 and the Court awarded the Respondent Kshs 262,050/- plus costs and interest and which judgment was promptly communicated to the Appellant’s Insurer.
 - b. The Appellants failure to enter appearance and file defence in the primary suit was deliberate since the appellant and their insurer were aware of the suit from 26th August 2020 when they received the summons and statutory notice respectively.
 - c. The applicants/appellants filed an application for setting aside the judgment and for stay of execution which was consequently dismissed by the Trial court and a ruling delivered on 31/05/2022.
 - d. The applicants/appellants have been enjoying the stay of execution orders from 23/12/2022 and their present application in this court is purely to hood wink this court to issue an order to stay the execution of the said decretal sum and no sufficient cause has been demonstrated on why the execution ought to be stayed since execution is a lawful process sanctioned by the law.
 - e. The Applicants have not attached the ruling or the order that they intend to appeal against and therefore making the application a non – starter and fatally defective.
 - f. The Applicants/Appellants application is devoid of merit for reasons that it does not conform to the requirements for stay of execution of decrees and as envisaged by the *Civil Procedure Rules* and the *Civil Procedure Act*.



- g. The Applicants/Appellants have not demonstrated what they stand to suffer should execution proceed while on the other hand the Respondent will suffer prejudice if judgment is set aside

Applicant's Supplementary Affidavit

4. The Applicants/appellant filed a supplementary affidavit sworn on 14/07/2022 in response to the Respondents Replying affidavit deposing as follows;
- a. The allegation that the said Ruling has not been availed at the instance of filing the instant application does not extinguish its merit as the same was done in urgency owing to the fact that the warrants of attached were falling due. The impugned ruling has now been availed therefore the Constitution ought to abide.
- b. If the Applicants was served with summons to enter appearance a return of service would have been attached and/or filed in Court but the same was not done hence no evidence to this effect has been availed.
- c. The statutory notice was attached because the Respondent only served the insurance company but not the defendants yet the same ought to have been served personally.
- d. The amount intended to be recovered does not warrant unlawfully seizing two of the Applicants public service vehicles to recover about an eighth of the sum the Respondents claims to be owed.
- e. The Applicants are simply seeking for an opportunity to be heard which theory were denied by the trial court and the only further recourse they had was to humbly come to this court for the very same orders sought as it is clear that the appeal has merit and be granted an opportunity to prosecute the appeal without worry of execution.

Written Submissions

Applicants Submissions

5. The conditions for the grant of a stay of execution pending an appeal are laid out in Order 42 Rule 6(2) which states that, "no order for stay of execution shall be made under sub rule (1) unless;
- a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. Such security as the court orders for the due performance of such decree or orders as my ultimately be binding on him has been given by the applicant
6. On the issue of substantial loss the applicants have already posited that the respondent vide Anfield Auctioneers impounded two of their public service motor vehicles estimated to costs Kshs 1,000,000/- each yet the amount claimed as due is Kshs 412,446.50/- as at 8th June 2022 when the warrants were taken out while on the other hand the respondent is yet to show that she is a person of means who would be easily able to restituted the decretal sum or even the sum of Kshs 2,000,000/- were the two vehicles to be sold.
7. Reliance is made in the case of Firoze Nuyrale Hirji v Housing Finance Company of Kenya Limited and Wattas Enterprises Limited – Nairobi HCCC No 226 of 2003, the Court stated that;

“...the law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be



expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”

8. In the instant case the Respondent will unlikely to be capable of refunding the decretal amount if the appeal succeeds and that will have rendered the appeal academic.
9. On the issue of whether the application was made without unreasonable delay, the ruling of the Trial Court was delivered on 30th May, 2022. The application seeking to stay execution pending the appeal and stay of the primary suit filed on 13th June, 2022 and appeal filed on 9th June, 2022 hence both the appeal and application seeking stay in this matter was filed within thirty days as required by Section 79G of the Civil Procedure Act.
10. On the issue of security the applicants have stated that they are willing to abide by any condition imposed for granting of stay of execution in due performance of the decree.
11. On the issue of whether the appeal raises triable issues it is submitted that the applicants were never granted an opportunity to defend themselves which is the gravamen of the appeal. See the case of Blue Shield Insurance Company Limited v Joseph Mboya Oguttu [2009] eKLR (CACA 262 of 2003 – Kisumu) the court relied on the case of Moi university v Vishva Builders limited – Civil appeal 296 of 2004 (unreported) this court said;-

“The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend..... As we know even one trial issue would be sufficient – see *H.D Hasmani v Banque Du Congo Belge* (1938) 5 E.A.C.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v E.A. Cargo Handling Services Ltd.* [1974] E.A. 75 at P. 76 Duffus P. said; - “In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan, J put it “a triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for adjudication.”

12. The allegation that the appeal is merely academic does not stand as it is for the appellate court as well to determine the appeal. Since the appellants/applicants were not given an opportunity to defend themselves it is clearly a triable issue duly raised in the memorandum of Appeal.
13. On whether the appeal is arguable the appellant has presented seven grounds of appeal which both address the law and facts.
14. Finally on where the application is brought in extreme bad faith it is submitted that the application has been made in good faith as the Respondent will not suffer any loss or prejudice if the orders sought herein are granted.

Respondent’s Submissions Dated 25th August, 2022

15. On behalf of the Respondent it is submitted that Order 42 rule 6(2) of the Civil Procedure Rules of be applied in the instant case.



16. Reliance is made in the case of *Teresia Kimani v Githere Investments limited* – CA 944 of 2003 the Court stated that;

“The applicant will succeed if he/she demonstrates to the satisfaction of this court that substantial loss will ensue if the order of stay is not granted; that he has filed the application without undue delay; and that he has offered such security as may be ordered. The onus is on the applicant to discharge the above through at their position. A stay order does not lie as a matter of course just because one has filed an appeal. One has to demonstrate the likelihood of suffering substantial loss if the order is refused.”

17. Also in the case of *Mwaura Karuga t/a Limite Enterprises v Kenya Bus Services Limited & 4 others* [2015] eKLR

“the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

18. On the issue of arguable appeal the applicants herein have neither demonstrated that there exists an arguable appeal with high chances of success nor satisfied the pre-requisite conditions set out in Order 42 Rule 6 of *CPR*. The Respondent submits that the appeal has little or no chance of success since the appellants have not explained essentially the reasons for delay in filing a defense in the trial court despite being served with summons to enter appearance. The appeal is frivolous and has no chance of success since there is no bonafide ground raised in the appeal that would necessitate arguing in the appeal.

19. On loss the Appellants claim that they will suffer irreparable loss if the respondent is allowed to execute the orders issued by the trial court it is submitted that in the unlikely event that the Applicants intended appeal succeeds the Respondent would be able to refund the detrital amount to the Applicant and nothing has been shown to the court in the contrary.

20. See the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR while dealing with substantial loss the Court held that;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory”

21. It is finally submitted that the application and intended appeal lacks merit since both are misleading, bought in bad faith, and ought to be dismissed with costs.



Determination

22. The Court has considered the application for stay of execution. The pleadings and the Ruling subject of the Appeal and finds as follows;

Section 78 -79 [CPA](#) grants right of appeal to aggrieved parties and sets out the process of appeals whilst Order 42 [CPR](#) 2010 provides the conditions for stay of execution.

Undue Delay

23. In the instant matter, with regard to undue delay;

The Ruling of the Trial Court was delivered on 30th May, 2022. The application seeking to stay execution pending the appeal and stay of the primary suit filed on 13th June, 2022 and appeal filed on 9th June, 2022 hence both the appeal and application seeking stay in this matter was filed within thirty days as required by Section 79G of the [Civil Procedure Act](#).

Substantial Loss

24. On the issue of substantial loss- the appeal will be rendered nugatory if the subject-matter is not preserved, if the execution is imminent as was the case herein but halted orders of temporary stay of execution by Hon G.v Odunga J (as he then was) on 13/6/2022. [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR *supra* & the case of [Teresia Kimani v Githere Investments limited](#) – CA 944 of 2003 *supra* set out parameters of substantial loss which are applicable to the instant case.
25. Ringera J (as he then was) stated in the case of [Global Tours & Travels Limited](#), Nairobi Hc Winding Up Cause No 43 of 2000 opined thus:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

(Emphasis added)

26. In [Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi](#), civil Appeal No 326 of 2013 it was pointed out that:

“To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- a. Whether the applicant has established that he/she has a prima facie arguable case;
- b. Whether the application was filed expeditiously; and



- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”

Arguable Appeal

27. On the issue of an Arguable Appeal- At this stage the Court should not delve into the merits of the appeal but facilitate the applicant’s right to lodge and be heard on appeal.

As to what constitutes an arguable appeal, the Court of Appeal in *Nairobi Women’s Hospital v Purity Kemunto* [2018] eKLR:-

“To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues.”

Furnish Security

28. The Applicant ought to comply with Order 42 Rule 6 *CPR* 2010 with regard to provision of such security as the court orders for the due performance of such decree or orders.
29. The Respondent argued that the decree is a money decree and in their view the appeal is lodged with sole intention of denying Respondent fruits of its judgment.

Disposition

1. Stay of execution is granted on condition the full decretal amount is deposited in a joint interest earning Account of the Appellant’s and Respondents Advocates on record within 90 days of this Ruling.
2. Thereafter, the appellant may file record of Appeal if need be or file certified proceedings that culminated to the Ruling in question and serve.
3. The parties may then obtain directions on hearing and determination of the appeal.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 28TH APRIL 2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

